Eight Mile Style, LLC et al v. Apple Computer, Incorporated Doc. 110

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EIGHT MILE STYLE, LLC, and MARTIN AFFILIATED, LLC,

Plaintiffs,

vs.

APPLE COMPUTER, INC. and AFTERMATH RECORDS d/b/a AFTERMATH ENTERTAINMENT

Defendant.

Case No. 2:07-cv-13164
Hon. Anna Diggs Taylor
Magistrate Judge Donald A. Scheer

Howard Hertz, Esq. (P26653)
Jay G. Yasso, Esq. (P45484)
Hertz Schram PC
1760 S. Telegraph Rd., Suite 300
Bloomfield Hills, MI 48302
(248) 335-5000
hhertz@hertzschram.com
jyasso@hertzschram.com
Attorneys for Plaintiffs

Richard S. Busch (TN BPR#14594)
King & Ballow
1100 Union Street Plaza
315 Union Street
Nashville, TN 37201
(615) 259-3456
rbusch@kingballow.com
Attorneys for Plaintiffs

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO STRIKE

Dockets.Justia.com

CONCISE STATEMENT OF ISSUES PRESENTED

Whether the Court should strike an expert declaration based on an attorney's participation in drafting it?

Plaintiffs' answer: No.

Whether the Court should strike an expert declaration which explains the expert's conclusions and reasoning?

Plaintiffs' answer: No.

Whether the court should strike a Statement of Material Facts because the Court did not require that such a document be filed?

Plaintiffs' answer: No.

Whether the Court should strike documents plaintiffs produced after the close of discovery but which were not called for in discovery requests and which were not relied on by plaintiffs in their Opposition to Defendants Motion for Summary Judgment?

Plaintiffs' answer: No.

CONTROLLING AUTHORITIES

Federal Cases

Gold v. Cadence Innovation, LLC,
No. 07-14435, 2008 U.S. Dist. LEXIS 64733 (E.D. Mich. Aug. 22, 2008)

Hi-Tech Video Prods., Inc. v. Capital Cities/ABC, Inc.,
58 F.3d 1093, 1095 (6th Cir. 1995)

Kubiak v. Medical Staffing Network, Inc.,
No. 07-CV-14261-DT, 2008 U.S. Dist. LEXIS 70115 (E.D. Mich. Sept. 16, 2008)

Manning v. Crocket,
1999 U.S. Dist. LEXIS 7966 (N.D. Ill. May 17, 1999)

Solaia Tech. LLC v. ArvinMeritor, Inc.,
361 F. Supp. 2d 797 (N.D. Ill. 2005)

Williams v. Ford Motor Co.,
187 F.3d 533, 543 (6th Cir. 1999)

Federal Statutes

17 U.S.C. § 410(c)

Federal Rules

Fed. R. Civ. P. 26(a)(2)(B) and 1993 Advisory Committee Notes

Fed. R. Civ. P. 83(b).

F.R.E. 702

Treatises

4 NIMMER ON COPYRIGHT § 13.01[A] (2006)

Defendants' motion to strike is a red herring, attempting to eliminate properly presented evidence distract this Court from its focus on defendants' own evidentiary improprieties (*see* Doc. No. 80) by pointing the finger elsewhere. Although the Court is perfectly capable of deciding what is and is not helpful to decide this motion, defendants have concocted baseless theories that evidence should be stricken because it does not conform to imagined requirements for which they articulate no legal basis. Defendants' argument that certain documents should be stricken because they were produced after the discovery deadline omits or ignores the relevant facts and has no basis in law.

I. The Declaration of Patrick Sullivan Should Not be Stricken

1. Attorney Assistance in the Preparation of an Expert Declaration is Appropriate

Defendants' motion attempts to make hay out of attorney assistance in the drafting of the Sullivan declaration. (Doc. No. 108, pp. 2-6). The Federal Rules are clear that attorneys may assist in the drafting of expert reports, and by logical extension, expert declarations. The Advisory Committee notes to Federal Rule of Civil Procedure 26 specifically contemplate attorney assistance in the creation of expert reports. It provides, in part, "Rule 26(a)(2)(B) does not preclude counsel from providing assistance to experts in preparing the reports, and indeed, with experts such as automobile mechanics, this assistance may be needed." *Fed. R. Civ. P. 26(a)(2)(B)* (1993 advisory committee notes).

In the case at bar, the need for attorney assistance is clear. The Sullivan declaration was submitted as part of a response to summary judgment. As such, the declaration needed to be drafted to fit the context of the motion. Plaintiffs' counsel was merely providing assistance to shape the same opinions Mr. Sullivan articulated in his expert report into the format needed for the Motion for Summary Judgment.

Although at least one court has condemned the crafting of an expert report by an attorney out of whole cloth, *see Manning v. Crocket*, 1999 U.S. Dist. LEXIS 7966. *8-9 (N.D. Ill. May 17, 1999), defendants' own moving papers make is clear that this did not occur for Mr. Sullivan's declaration: e-mail between counsel and Mr. Sullivan specifically demonstrate the Declaration was drafted from Mr. Sullivan's expert report, which he himself undeniably drafted, and contained all of his already-held opinions. (Doc. 108, p 5; *see also* Busch Decl. ¶ 2, Ex. 1.)

In addition, even if this were not the case, the proper remedy is not to exclude such a document but rather to adjust the weight given the evidence accordingly. *See, e.g.*, *Solaia Tech. LLC v. ArvinMeritor, Inc.*, 361 F. Supp. 2d 797, 804 (N.D. Ill. 2005) (citing *Occulto v. Adamar of NJ, Inc.*, 125 F.R.D. 611, 616-617 (D. N.J. 1989)). Here, however, counsel's role was merely to assist in articulating Mr. Sullivan's already-held opinions[1] (largely articulated in his expert report) in a concise declaration. (*See*, *e.g.*, Busch Decl. ¶ 2, Ex. 1 ("We are going to use much of what you said in your expert report in your declaration in support of the motion for summary judgment…").) Defendants' objections on this point are meritless.

2. **The Sullivan Declaration is Valid Expert Testimony**

Mr. Sullivan's testimony is proper expert testimony, not attorney argument. Federal Rule of Evidence 702 provides, in relevant part,

[1] Defendants quote one email from counsel to Mr. Sullivan at length, in which counsel advises that a statement concerning the differences between mechanical and DPD licenses should be added to the declaration, implying that this shows counsel was engaged in improper activity. (Doc. No. 108 at 4.) Defendants do not quote Mr. Sullivan's reply email, in which he states, "Yes, this is the specific reason why they lost the Farmclub argument and the definitions help differentiate the two types of licenses necessary for each use." (*See* Doc. No. 107, Ex. 1-B.)

> "If scientific, technical, or other **specialized knowledge** will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case."

F.R.E 702 (emphasis added).

Mr. Sullivan is an expert on licensing agreements in the music industry (*See* Doc. No. 74, Sullivan Decl., Ex. 1, Sullivan Expert Report) and the testimony defendants object to was no more than his expert opinion concerning whether the proffered "license" agreements would be accepted as valid under the common practice in the industry. As noted above, most of Mr. Sullivan's declaration was drafted from his expert report, applying the general statements within to the specific documents in question here. Thus, far from being contrary to the Rules, the Declaration comports with the requirement that opinions in expert submissions not be conclusory. *See, e.g.*, *Williams v. Ford Motor Co.*, 187 F.3d 533, 543 (6th Cir. 1999) (quoting *Hayes v. Douglas Dynamics, Inc.*, 8 F.3d 88, 92 (1st Cir. 1993)). Defendants are trying to manipulate this rule into a catch-22: if an expert affidavit contains no justification for the opinions offered therein it is struck as "conclusory," but if it gives reason and background, it should be struck as "attorney argument."

Defendants also complain that the Sullivan declaration is an "end run" around the page limits established by the court. (See Doc. 108 at 8-10.) Presumably, defendants would not be satisfied unless the entirety of Mr. Sullivan's Declaration and expert report were contained within plaintiffs' brief. This is neither required nor desirable. Mr. Sullivan's reasoning and justification for his opinions is his own, based on his expertise in the field, and need not be reprinted in the memorandum of law itself.

Mr. Sullivan's declaration is not an attempt to avoid page limits for the same reason. It would be impractical and wasteful of the Court's time to include all of the reasoning in Mr. Sullivan's expert report (which is 16 pages, not counting appendices, *see* Doc. No. 74, Sullivan Decl. Ex. 1), which in turns leads to the analysis and conclusions expressed in his declaration.

II. The Statement of Material Facts Should Not be Stricken

Defendants' main complaint concerning plaintiffs' Statement of Material Facts (Doc. No. 79) is that neither the Federal Rules of Civil Procedure nor the Local Rules of this Court require the submission of such a document. Plaintiffs do not contest this point. However, the Federal and Local Rules also do not prohibit such a Statement. As noted by the defendants themselves, the Court has the authority to "regulate practice in any manner consistent with" the Federal or Local rules. (Doc. No. 108 at 8 (citing Fed. R. Civ. P. 83(b)).) Because submission of such a document is not foreclosed by either set of rules, consideration of this document is entirely within the Court's discretion.

As defendants acknowledge, many jurisdictions do require a "statement of material facts" (*Id.*) Even this Court has at times requested and/or required such statements from parties. *See, e.g.*, *Kubiak v. Medical Staffing Network, Inc.*, No. 07-CV-14261-DT, 2008 U.S. Dist. LEXIS 70115 at *1 n1 (E.D. Mich. Sept. 16, 2008); *Gold v. Cadence Innovation, LLC*, No. 07-14435, 2008 U.S. Dist. LEXIS 64733 (E.D. Mich. Aug. 22, 2008). Although the Court has not required such submissions in this case, they are neither contrary to local rules nor beyond the knowledge of this Court.

In keeping with situations where such submissions are required, plaintiffs did not use the Statement of Material Facts to state additional facts not in their brief. Defendants' contention that the Statement is an attempt to circumvent page limits is meritless. The Statement no more violates the page limitation than does defendants' own response to plaintiffs' motion to exclude (Doc. No. 86), which rehashes at length arguments contained in their motion for summary judgment. Nor have plaintiffs used the statement as a forum to make legal argument; the statements listed by defendants are facts established by the cited material. To the extent that the Court finds any points "argument" instead of fact, the court may simply disregard the item in question. *See* Fed. R. Civ. P. 83(b).

III. Plaintiffs' Documents Should Not be Stricken

Defendants purport to "conditionally" move to strike certain documents submitted in support of plaintiffs' opposition to summary judgment. (Doc. No. 108 at 10-12.) Defendants' sole reasoning for this request is that these documents were produced after the June 2, 2008 discovery cut-off and plaintiffs have not justified this "delay" to defendants' satisfaction. The documents defendants complain about consist of: a) "licenses" produced June 4, 2008; b) agreements produced August 28, 2008; c) copyright registrations produced September 15, 2008; and d) a "long-sought" document produced October 6, 2008. While plaintiffs acknowledge that these documents were produced after June 2, 2008, they were produced either as soon as they came into plaintiffs' possession (categories (a) and (c) above), or their production was not called for in discovery requests.

Defendants' intentions in their motion – to provide a smokescreen for their own improper actions (*see* Doc. No. 80) – are laid bare by their request to strike these documents. Defendants repeatedly request that documents "produced after the discovery cut-off and submitted in support of [plaintiffs'] opposition" be stricken. (*See* Doc. No. 108 at 10-12.) However, they then bafflingly then go on to describe two categories of documents produced *after* plaintiffs filed their opposition (on August 28, 2008) and which have *nothing to do* with plaintiffs' opposition. In addition, no documents in the June 4, 2008 production were submitted in support of plaintiffs' opposition. Regardless, plaintiffs address each document production below.

The June 4, 2008 production

On June 4, 2008, plaintiffs produced 100 pages of license requests from UMG addressed to plaintiff, many of which had earlier been produced, and the remainder were similar to those produced earlier during discovery. (Busch Decl. ¶ 3.) When defendants asked why the documents were not produced until this date, plaintiffs responded that the documents had been located on June 3, 2008 and produced the following day, and suggested a date on which Mr. Martin, who defendants had deposed about the similar documents produced earlier in discovery, could be deposed concerning these newly produced documents. (Busch Decl. ¶ 4, Exs. 2, 3.) This supplemental deposition of Mr. Martin took place on June 26, 2008. Thus, defendants can have no claim of prejudice from this production.

Regardless, none of these documents were submitted in support of plaintiffs' opposition. Why defendants include these documents in a motion that purports to exclude "documents submitted in support of" plaintiffs' response to defendants' summary judgment motion is mystifying.

1. **The August 28, 2008 production**

The documents produced August 28, 2008, which defendants do not describe in any way except by noting their production date, were only produced because defendants wrote a letter asking for such documents after the close of discovery (See Busch Decl. ¶ 5, Exs. 4, 5.) These documents had not been previously requested and consisted of a number of copyright assignment and co-publishing agreements between plaintiffs and some of the co-writers of the compositions, and, in one case, with Ensign Music Corp. (*See id.*) As discussed below, these documents were not necessary to establish plaintiffs' claim of ownership in the Eminem compositions, and were neither called for in discovery nor required to be produced, but plaintiffs graciously adhered to defendants' request nonetheless.

The Copyright Act states that production of a valid copyright registration certificate constitutes *prima facie* evidence with respect to the elements of copyright ownership. 17 U.S.C. § 410(c); *Hi-Tech Video Prods., Inc. v. Capital Cities/ABC, Inc.,* 58 F.3d 1093, 1095 (6th Cir. 1995). Plaintiffs are the original copyright claimants to the composition copyrights in the Eminem compositions and therefore no chain of title evidence is required. 17 U.S.C. § 410(c); *Hi-Tech Video*, 58 F.3d at 1095; 4 NIMMER ON COPYRIGHT § 13.01[A] (2006) (plaintiff's chain of title by assignment is presumed upon copyright registration). Thus, these documents were not required to be produced by plaintiffs.

Second, defendants did not request all documents related to plaintiffs' ownership of the Eminem compositions, nor did they even request documents relating to the "chain of title" to the copyrights. (*See* Doc. No. 107 Ex. 1F, Document Request Nos. 1, 6, 8, 13, 14, 18, 19; *id.* Ex. 1D, Interrogatory Nos. 1, 2 and 5.) Nor did plaintiffs agree, as defendants imply, to produce *all* documents that might have information connected to those requests. Instead, plaintiffs made various objections to the requests in question, but agreed to produce certain documents *subject to* those objections. (*See id.*)

Because these documents were not being relied upon by plaintiffs, and were not requested by defendants, there was no reason to ever produce them. Plaintiffs produced these documents voluntarily, and without any obligation to do so, when defendants wrote a letter requesting them (plaintiffs did so in order to put to rest any concern by defendants that plaintiffs did not have the ownership interest in the compositions claimed), and there is no basis to strike such documents.

2. **The September 15, 2008 Production**

On September 15, 2008, plaintiffs produced 51 pages of documents consisting of copies of the copyright registration certificates for some of the compositions at issue. (Busch Decl. ¶ 6.) Certificates for most of the compositions at issue were attached as exhibits to the Complaint in this case when it was initially filed. (*See* Doc. No. 1.) However, some certificates were not in plaintiffs' possession at that time, and for that reason plaintiffs attached print-outs of the copyright information contained on the Copyright Office's publicly accessible website, which shows much of the same information as is contained on the registration certificate. (*See id.*) On September 15, 2008, plaintiffs obtained copies of the certificates of registration for those compositions whose certificates were not attached to the Complaint and immediately produced them to defendants. (Busch Decl. ¶ 6.)

Certificates of registration are public documents that any person may obtain a copy of from the Copyright Office. Plaintiffs obtained copies of these certificates merely to forestall any possible complaint that print-outs from the Copyright website were insufficient or inaccurate. These documents were equally available to defendants as they were to plaintiffs since the inception of this case, and defendants can demonstrate no prejudice or rationale for striking them as exhibits.

As noted above, these documents were produced on September 15, 2008, over two weeks after plaintiffs submitted their opposition to defendants' summary judgment motion, and the documents have never been submitted to the Court. Defendants' request that the Court "strike" documents which are not before it presents an impossibility.

3. **The October 6, 2008 Production**

Similarly, on October 2, 2008, defendants sent a letter to plaintiffs revealing that they were in possession of a document, a "notice" from Music Resources, Inc., which they believed revealed that plaintiffs were not owners of the Eminem compositions. (Busch Decl. ¶ 7, Ex. 6.) Defendants also demanded production of an agreement between plaintiff Eight Mile Style and Music Resources, Inc. (*Id.*) Plaintiffs responded by letter on October 6, 2008, informing defendants that the agreement between Eight Mile Style and Music Resources, Inc. was neither relevant nor requested in discovery, and that the "notice" was in error to the extent it implied plaintiffs had transferred their ownership rights in the Eminem compositions to Music Resources, Inc. (Busch Decl. ¶ 7, Ex. 7.) Despite its irrelevance, Plaintiffs produced a portion of the agreement with Music Resources, Inc. to dispel any doubt that ownership in the compositions had not been transferred. (*See id.*)

In addition, as with the September 15, 2008 production, these documents were produced long after plaintiffs' opposition was filed and are not before the Court.

As shown by all of the above, defendants' motion is a superficial and transparent attempt to distract this Court's attention from plaintiffs' motion to strike documents submitted by them in support of their motion for summary judgment even though such documents were not produced during discovery, although undeniably required to be produced. Plaintiffs respectfully ask the Court to see through this gamesmanship, and deny defendants' motion.

* * * *

For the reasons above, plaintiffs respectfully request that the Court deny defendants' motion.

/s/ Richard S. Busch
Richard S. Busch
(TN Bar No. 014594)
1100 Union Street Plaza
315 Union Street
Nashville, TN 37201
(615) 259-3456
rbusch@kingballow.com

/s/ Howard Hertz, Esq.
Howard Hertz, Esq. (P26653)
Hertz Schram PC
1760 S. Telegraph Rd., Suite 300
Bloomfield Hills, MS 48302
(t): (248) 335-5000
(e): hhertz@hertzschram.com

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing document was served via the Court's Electronic Filing System:

Counsel	On behalf of
Daniel D. Quick, Esq. Dickinson Wright PLLC 38525 Woodward Ave Suite 2000 Bloomfield Hills, MI 48304 (t): (248) 433-7200 (e): dquick@dickinsonwright.com Kelly M. Klaus, Esq. Munger, Tolles & Olson LLP 355 South Grand Ave Suite 3500 Los Angeles, CA 90071-1560 (t): (213) 683-9238 (e): kelly.klaus@mto.com	Apple Computer, Inc. and Aftermath Records d/b/a Aftermath Entertainment

this 30th day of October 2008.

s/ Richard S. Busch